No. 16274

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUTHORIZED SUPPLY COMPANY OF ARIZONA, a Corporation,
Appellant,

vs.

SWIFT & COMPANY, a Corporation, ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation,
Appellees.

ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation,
Appellants.

vs.

SWIFT & COMPANY, a Corporation,
Appellee.

REPLY BRIEF OF APPELLANT AUTHORIZED SUPPLY COMPANY.

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REPLY BRIEF OF APPELLANTS AUTHORIZED SUPPLY COMPANY.

Foreword.

The brief of the Appellee, Swift and Company, raises questions which vitally concern the appeal of Authorized Supply. Where that appellant and Southern Arizona York Refrigeration Conpany, the other appellant, have both taken the position that the exchange of coil units heretofore explained amounted in law to a binding election of remedies precluding an action by Swift for damages, Swift has attempted in its own brief to refute that argument.

This brief, therefore, is concerned with considering and answering the questions raised and arguments made in the brief of Swift and Company.

Argument.

It has previously been pointed out, in this appellant's opening brief, that the Arizona statute controlling on the problem is clear and unambiguous, and that the overwhelming weight of American authority supports the construction placed upon it by this appellant.

Appellee Swift makes two arguments:

1. That the case of *Clyde Equipment Company v. Fiorito, et al.,* 16 F. 2d 106, is controlling here and requires the result reached in the trial court.

2. That Arizona Revised Statutes, 1956, Section 44-270, set out in appellee's brief, as construed in three cases from other jurisdictions, compels the result for which it argues.

Appellant Authorized Supply Company will consider those propositions in that order.

I.

Does *Clyde Equipment Co. v. Fiorito, et al.,* 16 F. 2d 106, control here on the question of whether Swift and Southern Arizona York made a binding election of remedies? In that case, the defendant was a manufacturer of road equipment who supplied to the buyer with rock crushing machinery which included certain rolls. The rolls proved defective and were returned to the seller. The trial court held that this did not bar buyer's subsequent action for resulting damages. *On appeal, the evidence was not before the court.* This Court merely said that the evidence would be *presumed* to have shown

> ". . . an understanding, more of less definite, that the contract—which included other items than these . . . rolls—was not rescinded . . .; and where, as here, the evidence is not before us, we must . . . so construe the finding. . . ."

Here the evidence is before this Court, and there is in it not a vestige of evidence of any such understanding between Authorized Supply, the seller, and Southern Arizona York, the buyer. All the parties agreed that the transaction was simply the return of defective coils and their replacement with new ones, with no understanding or conversation whatever concerning rescission or the buyer's reservation of any rights.

Further, if dicta in the *Clyde* case can be cited as supporting Swift's position, it should be pointed out that that dicta is clearly wrong. That case came to this Court from Washington state in 1926. The law of Washington should have been applied. In 1909, in *Houser and Haines Mfg. Co. v. McKay,* 53 Wash 337, 101 Pac. 894, decided under the common law, the Washington court, ruling squarely on the very question now before this Court, said:

> "If (buyer) chose to exercise the special remedy by returning the article to the seller, he is then confined to a recovery of the purchase money paid and cannot maintain an action to recover damages for breach of the warranty . . ."

and

> "We have not been able to find any diversity of authority on this question."

In 1925 Washington enacted the Uniform Sales Act, including Section 69 in the same form in which it exists today in the Arizona Revised Statutes, 1956. The rule was thereafter recognized, and Section 69 quoted, in *Crandall Engineering Co. v. Winslow Marine Ry., etc., Co.,* 188 Wash. 161 P. 2d 136 (1936). In short, the rule in Washington is and always has been the rule urged here by this appellant. The dictum of the *Clyde* case has never been the law of Washington or of any other state within the appellate jurisdiction of this Court.

II.

Does Section 70 of the Uniform Sales Act require the result reached here in the trial court?

Three cases have held that it does. They are cited in Swift's brief, and are:

Russo v. Hochschild Kohn & Co., Inc., 184 Md. 462, 41 A. 2d 600;

Marko v. Sears, Roebuck & Co., 24 N. J. Super. 295, 94 A. 2d 348;

Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315.

The last two reply on *Russo; Russo* relies on Section 70.

That section reads as follows:

> "Nothing in this chapter shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damage may be recoverable, or to recover money paid where the consideration for the payment of it has failed."

The Section, it is submitted, is entirely clear, and means exactly what it says. (For case properly applying it, see *e.g., Smith v. Johnson,* 120 Wash. Dec. 300, 98 P 2d 312.) *Where by law special damages are recoverable,* the Uniform Act does not affect the right to recover them. The Section is impossible of proper application here because, *by common law as well as Section* 69, special damages are not and were never recoverable by the buyer after the goods bought had been returned by him and replaced or the price refunded. As is pointed out in this Appellant's Opening Brief, the Uniform Sales Act codified, but did not change, the common law. The cases which have applied Section 70 here have, we submit, intentionally misread the Section in an effort to justify the action of the courts in avoiding harsh results. Hard cases have in all three instances been permitted to make bad law. Section 69 of the Statutes is clear and unambiguous, and denies Swift and Southern Arizona York their action here. That result may indeed be a harsh one. But it is a result required by crystal-clear legislative action. If the law is to be changed, it is for the Legislature of Arizona to change it, as the New York legislature did (see this Appellant's opening brief). Section 69 does not itself take away any right of action from Swift or Southern Arizona York. It merely recognizes that they here never at common law had any right of action after the coils were returned and replaced, and continues in force the rule denying the right. Section 70 cannot properly be read to change the common law and was never so intended. It

cannot properly be read to create in Swift and Southern Arizona York a cause of action non-existent at common law and expressly repudiated in Section 69.

Conclusion.

The overwhelming weight of American authority, both at common law and under the Uniform Sales Act, supports this appellant's position that when Swift and Southern Arizona York returned the defective coils for replacement, they elected their exclusive remedy, and cannot recover in this action. The legislative purpose in adopting the Uniform Sales Act, manifest in the language of the Act itself, was to make the rules in Arizona uniform and consistent with those generally prevailing elsewhere. There are 3 states in which decisions permit this action against this Appellant. Elsewhere, the long-standing and universal rules is well-established that the action cannot be maintained. The Arizona courts would, we submit, follow that rule, having twice done so in the past (see this appellant's opening brief). This Court should also follow it.

The judgment against Authorized Supply Company should be reversed, and the trial court directed to enter judgment in its favor on the Third-Party Complaint.

Respectfully submitted,

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